

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Section 257 Proceeding to Identify and )  
Eliminate Market Entry Barriers for )  
Small Businesses )

GN Docket No. 96-113

DOCKET FILE COPY ORIGINAL

COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits these comments in response to the Notice of Inquiry ("NOI") in the above-referenced proceeding. In the NOI, the Commission requested information regarding the extent to which market entry barriers prevent small businesses from competing in telecommunications markets and the means of eliminating those barriers.

OpTel, through its subsidiaries, operates private and franchised cable systems in cities throughout the United States. OpTel's systems are among the first true competitors to the dominant franchised cable operators in the local multichannel video programming distribution ("MVPD") markets in which they compete. In OpTel's experience, some of the most significant barriers to entry into the MVPD market, which adversely affect small businesses, are a vestige of the monopoly power that franchised cable operators have had for many years: Perpetual service contracts. These contracts are used to prevent new entrants from competing to provide service to multiple dwelling units ("MDUs"), which comprise the segment of the market that can most readily support niche service providers or small businesses. To eliminate this barrier to entry, OpTel urges the Commission to apply its "fresh look" doctrine to MDU exclusive service contracts with franchised operators that extend in perpetuity.

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## DISCUSSION

### **I. Perpetual Contracts Block Entry Into The MVPD Market And Slow The Development Of Competition.**

#### **A. Private Cable Operators Are Beginning To Provide Competition To The Franchised Cable Monopolists.**

Private cable operators compete directly with large franchised cable multiple system operators ("MSOs") in the local MVPD market. Private cable operators, however, are dwarfed by their MSO competitors. For instance, Tele-Communications, Inc., one of the largest MSOs in the United States, has over 14 million subscribers nationwide. OpTel, by contrast, which is one of the largest private cable operators in the United States, provides video programming services to approximately 110,000 customers. Many, if not most, private cable companies operate one or a few systems and serve only a few thousand subscribers. True SMATV systems typically serve a single MDU. Thus, private cable and SMATV operators are the quintessential small telecommunications businesses for which Section 257 was intended.

Despite their relatively small size, SMATV and private cable operators compete aggressively with the large franchised cable operators in the MDU sub-market of the MVPD market. In many cases, private cable operators provide services or MDU-specialized programming that the MSOs are unwilling or unable to provide.

Private cable systems serve one or more MDUs without using hard-wired crossings of public rights-of-way. Although this architecture relieves the private cable operator of the obligation to obtain a local franchise for its system, it requires the operator to install and maintain an entire distribution network, including satellite or microwave reception equipment, at each property served. Whereas franchised cable operators can amortize their costs over an entire franchise area, private cable operators are required to recoup their investment through each installation. Thus, for the most part, only MDUs offer sufficient subscriber concentrations to justify the investment required to operate a private cable system.

Because of these economic considerations, the MDU sub-market is a principal point of entry for private cable operators and other new competitors into the MVPD market. This fact has not been lost on the franchised cable MSOs. The MSOs have used a number of tactics to foreclose the MDU sub-market to new competitors and to fortify their dominant position in the market. For example, franchised cable operators have targeted rate discounts, not available in areas in which there is no competition, to MDUs

at which a new competitor is seeking to provide service.<sup>1</sup> In other instances, they have sought to limit MVPD competitors' access to essential programming in order to gain an advantage in the marketing of their services to MDUs.<sup>2</sup> OpTel has challenged the lawfulness of these practices.

Whether lawful or not, however, these tactics have proven to be quite effective in thwarting competition at MDUs. The franchised operator competing with a would-be new entrant for the right to provide service to an MDU offers the MDU managing agent special prices not available to subscribers who have no competitive choice, and cable programming that the new competitor cannot offer because the franchised operator controls the distribution of the programming.

Even where the franchised operator's conduct constitutes a flagrant violation of the Commission's rules, it often is not worth the considerable time and expense for the smaller, competing MVPD provider to challenge the practice in question. For instance, if a franchised operator or a vertically integrated programmer violates the program access rules by unreasonably discriminating against a competing MVPD provider, a program access complaint to the Commission regarding the discrimination may take months or years to resolve, only to end in an order requiring the programming at issue, to which the competing provider was entitled all along, to be made available to the complainant. The competing provider is not compensated for the damages suffered from the loss of the programming while the complaint was pending and the violator is not punished for its unlawful behavior.

Complaints regarding non-uniform or targeted pricing are similarly futile. Because of the time required to resolve such a complaint and the practical unavailability of fines or damages, competing MVPD providers, typically small telecommunications businesses, have little incentive to invest precious resources in the complaint process. As a result, the Commission's rules prohibiting various anticompetitive practices are, in practice, merely precatory and widely skirted.

**B. Franchised Cable Operators Use Perpetual Contracts To Lock-Out Competitors From The MDU Market.**

An even more effective (and less expensive to the franchised operator) device to thwart competition is an agreement that locks the MDU into a service contract with the

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<sup>1</sup> See, e.g. OpTel, Inc. v. Jones Intercable, Inc., Petition for Special Relief, CSR-4620 (filed Nov. 7, 1995); OpTel, Inc. v. Multimedia Cablevision, Inc., Petition for Special Relief (filed Dec. 15, 1995).

<sup>2</sup> See OpTel, Inc. v. Century Communications, Inc., File No. CSR-4736-P (filed Apr. 9, 1996).

franchised operator in perpetuity.<sup>3</sup> These perpetual agreements defeat any effort to introduce new competition into the MVPD market and limit “opportunities for entrepreneurs and small businesses in communications services.”<sup>4</sup>

Because they often are confused with one another,<sup>5</sup> it is important to distinguish between anticompetitive perpetual contracts and procompetitive exclusive contracts. The economics of the MDU marketplace favor the use of exclusive service agreements. *De facto* exclusive franchising of cable systems occurs because of the “extraordinary expense of constructing more than one cable television system to serve a particular geographic area.”<sup>6</sup> For similar reasons, exclusive access agreements are the norm at MDUs, both for franchised cable operators and private cable operators. To the extent that an MDU population becomes splintered between two or more service providers, the advantages of providing service to a high concentration MDU are lost. Without some measure of exclusivity, the probable return on investment may be reduced below that which would make the installation commercially viable for a small business.

The need for exclusivity is particularly important to private cable operators and other new entrants into the MVPD market. As noted above, private cable companies install and maintain an entire distribution network at each property. Other new entrants may use different technologies, but they, too, begin by serving niche populations. Neither can amortize the cost of an installation over an entire franchise area as a franchised cable operator can. Thus, exclusivity, for a reasonable period of years, is essential to the ability of most alternative video programming distributors to compete. The “laboratory” of the states proves this point. Although private cable operators, including OpTel, largely have avoided MVPD markets in northern states where “cable mandatory access” laws are commonplace, they have expanded rapidly in southern states, which generally do not have such laws.

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<sup>3</sup> These contracts can take several forms, but the most common provide that the franchised operator has the exclusive right to serve the MDU in question “for the life of the franchise and any renewals or extensions thereof.” See, e.g., Appendix A. Because franchise renewals are all but automatic on the local level, these contracts foreclose a large segment of the market, and access to countless consumers, to cable competitors in perpetuity. In another proceeding, TCI denies the existence of such contracts. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Reply Comments of TCI (filed Aug. 19, 1996) at 14. In fact, TCI currently is seeking to enforce precisely such a provision in an alleged MDU contract with a property in Van Nuys, California. See Appendix B.

<sup>4</sup> NOI ¶ 41.

<sup>5</sup> See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Reply Comments of the National Cable Television Association, Inc. (filed Aug. 19, 1996) at 20.

<sup>6</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(2).

Exclusive contracts provide small, new entrants with the economic incentive and ability to build facilities and compete for customers. By contrast, the perpetual exclusive contracts that franchised cable operators have been using to lock-up whole blocks of subscribers block market entry and slow the development of competition. Most such perpetual contracts were executed in the 1970s and 1980s before virtually any competitive alternatives to franchised cable were available. At that time, franchised cable operators were able to approach MDU agents with a deal that only a monopolist can offer: Take our service on our terms, exclusively, in perpetuity, or leave your residents without cable service entirely. Given their unequal bargaining power, MDU owners and ownership associations were compelled to accept service on these terms.

As the range of options among MVPD distributors expands, it is becoming increasingly difficult for franchised operators to coerce MDU owners and ownership associations into perpetual contracts. Nonetheless, perpetual service contracts negotiated before the advent of competition continue to impair the efficient operation of the market. Consequently, to eliminate this barrier to entry into the MVPD market and enhance opportunities for small and entrepreneurial businesses, the Commission must take decisive action to free MDUs from these perpetual contracts and open the market to all competitors.

## **II. The Commission Should Apply Its “Fresh Look” Policy To MDU Perpetual Contracts.**

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The 1996 Act was intended to enhance consumer choice and promote competitive entry into the telecommunications markets.<sup>7</sup> Section 257, in particular, was intended to spur investment in telecommunications enterprises, encourage research and development of new telecommunications products and services, and expand the participation of small and entrepreneurial businesses in the telecommunications markets.<sup>8</sup> As the Commission recognizes in the NOI, the MVPD market is one of the segments of the telecommunications market that is in need of new entrants and greater participation by small business.<sup>9</sup>

Today, as a result of the introduction of new technologies and reduced regulatory barriers, a host of new competitors to franchised cable are beginning to gain a competitive toehold in the MVPD market. As detailed above, however, perpetual

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<sup>7</sup> See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 11 FCC Rcd 7413 (1996) ¶ 4 (citing Pub. L. No. 104-104, Joint Explanatory Statement at 1).

<sup>8</sup> See NOI ¶¶ 4-5.

<sup>9</sup> See id. ¶ 41.

service contracts frustrate market entry and stifle competition. Accordingly, OpTel urges the Commission to apply its “fresh look” doctrine to perpetual exclusive contracts to provide video services to MDUs.

**A. The “Fresh Look” Doctrine Should Be Applied To MDU Perpetual Service Contracts.**

The Commission’s well-established “fresh look” doctrine is intended to prevent companies that are dominant in the market from binding customers to long-term commitments before competition is introduced.<sup>10</sup> “Fresh look” allows customers committed to long-term contracts with an entrenched monopolist to take a fresh look at the marketplace once competition is introduced and to escape those contracts if they so desire with little or no termination liability. This approach “makes it easier for an incumbent provider’s established customers to consider taking service from a new entrant.... [and] obtain... the benefits of the new, more competitive...environment.”<sup>11</sup>

Application of the “fresh look” doctrine generally involves two steps. First, the entity subject to fresh look requirements is prohibited from engaging in some future conduct that might defeat or substantially delay the introduction of competition.<sup>12</sup> Second, the entity is required to allow its customers that are committed to contracts which extend into the competitive era to opt-out of those contracts during a “fresh look” period with little or no termination liability.<sup>13</sup>

In this case, there is little doubt that the franchised cable operators have a dominant position in the market. The Commission, the Department of Justice, and the courts have found that franchised cable operators are the dominant providers in the MVPD markets.<sup>14</sup> The existence of perpetual contracts, moreover, allows franchised cable operators to maintain their dominant position, particularly because most private

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<sup>10</sup> See Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd 2677, 2678 (1992); Expanded Interconnection with Local Tel. Co. Facilities, 8 FCC Rcd 7341, 7342-43 (1993), vacated on other grounds, Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (1994).

<sup>11</sup> Expanded Interconnection with Local Tel. Co. Facilities, 9 FCC Rcd 5154, 5207 (1994).

<sup>12</sup> For instance, in Competition in the Interstate Interexchange Marketplace, the Commission found that, because 800 numbers were not portable, AT&T could improperly leverage its market power in 800 services in its contract negotiations. 6 FCC Rcd at 5880, 5905. Thus, until 800 number portability became available, the Commission prohibited AT&T from bundling 800 service with any other service.

<sup>13</sup> Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd at 2677-78; Expanded Interconnection with Local Tel. Co. Facilities, 7 FCC Rcd at 7463.

<sup>14</sup> See In re Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, PP Docket No. 93-253, Comments of the United States Department of Justice at 2 (filed Nov. 20, 1995); In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, ¶ 215 (rel. Dec. 11, 1995); Turner Broadcasting v. FCC, 910 F. Supp. 734, 740 (D.D.C. 1995).

cable operators do not even attempt to compete for MDUs that are bound up by perpetual contracts. Thus, there will not be significant competition in the MDU market until the barrier to entry represented by these perpetual contracts is eliminated.

Despite the dominance of the franchised cable operators, OpTel is not seeking to implement the first step of the “fresh look” doctrine and prohibit perpetual right-of-entry agreements between franchised cable operators and MDU owners and ownership associations. Rather, OpTel is prepared to rely on the marketplace and not regulation to govern the relationship between MDU owners and multichannel video programming distributors on a going-forward basis. Imposition of the second step of the “fresh look” doctrine, however, is essential to achieve this deregulatory outcome. Therefore, the Commission should require franchised cable operators with perpetual contracts to allow their customers to opt-out of those contracts with no adverse contractual consequences.

As in previous instances in which the “fresh look” doctrine has been applied, the customers of dominant service providers should be given a fixed period of time within which to opt-out of their contracts. In Competition in the Interstate Interexchange Marketplace, the Commission determined that a ninety-day “fresh look” period was sufficient for long-distance customers to evaluate their options and negotiate new contracts when 800 numbers became portable.<sup>15</sup> When the Commission later confronted expanded interconnection to local exchange facilities, it provided for a 180-day “fresh look” window, recognizing that it would take longer than ninety days for the market to respond to expanded interconnection opportunities.<sup>16</sup>

The characteristics of the MVPD marketplace require that the “fresh look” window in this case should be at least 180 days. As the Commission’s decision in the Expanded Interconnection proceeding makes clear, the duration of the “fresh look” period should, in part, be predicated on the time it will take competitors to add capacity and meet increased demand in the particular market. In the MVPD market, it may take a new entrant several months to obtain the necessary approvals and construct the facilities needed to serve any given MDU. Thus, a three month “fresh look” window would be inadequate.

Further, the fact that franchised cable operators hold a series of dispersed monopolies rather than a single national monopoly requires that the “fresh look” window be tailored to the local MVPD markets. In previous applications of the “fresh

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<sup>15</sup> See 6 FCC Rcd at 5906.

<sup>16</sup> See 8 FCC Rcd at 7353 & n.48.

look” doctrine, the Commission has initiated the “fresh look” period when the dominant national service provider was first subject to competition. In this case, however, MDU owners and ownership associations must be freed from their perpetual contracts in order to create competition in each locality.

Thus, prior to the time when a franchised cable operator is subject to “effective competition” under Section 623 of the Communications Act,<sup>17</sup> the fresh look window should be “opened” at any given MDU upon the request of an alternative video programming provider able to serve the MDU in question. Moreover, once a franchised cable operator is subject to “effective competition” under the Act, even if there has been no specific request from a competitor, the fresh look window should be opened for six months beginning on the date of the “effective competition” determination. During the period, the property owner or ownership association could renegotiate or terminate its contract with the franchised cable operator free from contractual penalties or breach of contract litigation.

Application of the “fresh look” doctrine will allow the Commission to cease to regulate in this area entirely once there is actual or “effective” competition. At that point, MDU owners and ownership associations that enter into disadvantageous service contracts for their buildings do so, presumably, with full knowledge that competitive alternatives exist. The residential real estate market will self-regulate against MDU owners and ownership associations prone to such an error.

**B. The Commission Has Legal Authority To Apply Its Fresh Look Doctrine In This Context.**

The Commission has ample authority to apply its “fresh look” doctrine in the MVPD context. In the early days of cable television, cable operators were coercing communities into perpetual franchises and cable television service was “tend[ing] to develop on a noncompetitive, monopolistic basis.”<sup>18</sup> Based on its authority under Sections 2 and 4(i) of the Communications Act, the Commission responded to this market failure by prohibiting perpetual cable franchises.<sup>19</sup>

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<sup>17</sup> 47 U.S.C. § 543(l).

<sup>18</sup> In re Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems, 36 F.C.C.2d 143, 145 (1972); see also id., Clarification, 46 F.C.C.2d 175, 195 (1974) (limit on franchise terms “prompted by the initial trend in franchising that led to extremely long (i.e. 99-year) franchises .... [which] are an invitation to obsolescence”).

<sup>19</sup> 36 F.C.C.2d at 207-211, recon., 36 F.C.C.2d 326, 365 (1972).



The situation with regard to franchised cable perpetual contracts is analogous. Unless cable customers are permitted to escape contracts of unlimited duration that were executed at a time before competitive alternatives became available in the market, subscribers in these MDUs will forever be at the mercy of the franchised cable operators. This result would be inconsistent with the Commission's responsibility to see that all the people of the United States have available "rapid, efficient ... wire and radio communication service with adequate facilities at reasonable charges."<sup>20</sup>

Since the time of the 1972 franchise term limits, the Commission has been given additional authority to regulate franchised cable operators under Title VI. The Commission now is required to ensure that the rates charged to subscribers by cable systems not subject to "effective competition" are reasonable.<sup>21</sup> In addition, the Commission has been given oversight responsibilities with regard to local franchising under Section 621.<sup>22</sup>

Although previous "fresh look" cases have involved the regulation of common carriers under Title II of the Communications Act, the Commission's responsibility to regulate cable rates under Title VI is comparable.<sup>23</sup> The Commission thus would be well within its authority to hold that the use of perpetual contracts by franchised cable operators to leverage their market power from a non-competitive market into a competitive one, or from a market that is not yet competitive into the future, is an unjust and unreasonable practice.<sup>24</sup>

## CONCLUSION

Application of the "fresh look" policy to the perpetual service contracts of franchised cable operators would help the Commission to fulfill its obligations under Section 257. Only by opening up the perpetual service contracts of the franchised cable operators will new entrants into the MVPD market have an opportunity to compete.

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<sup>20</sup> 47 U.S.C. § 151.

<sup>21</sup> 47 U.S.C. § 543(b).

<sup>22</sup> 47 U. S. C. § 541.

<sup>23</sup> Cf. Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, 8 FCC Rcd 5631, 5723 (1993) (analogizing prescription under Title VI to rate prescription under Title II).

<sup>24</sup> Cf. Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd at 2682; Expanded Interconnection with Local Tel. Co. Facilities, 8 FCC Rcd at 7348.

Thus, and for the reasons set forth above, OpTel urges the Commission to apply its "fresh look" policy to all existing MVPD perpetual exclusive contracts.

Respectfully submitted,

OPTEL, INC.

A handwritten signature in black ink, appearing to read "W. Kenneth Ferree", written over a horizontal line.

/s/ W. Kenneth Ferree

Henry Goldberg

W. Kenneth Ferree

GOLDBERG, GODLES, WIENER & WRIGHT

1229 Nineteenth Street, NW

Washington, DC 20036

(202) 429-4900

Its Attorneys

September 27, 1996

# APPENDIX A

ROE#

00288

AGENT #

7324

## RIGHT OF ENTRY AGREEMENT A

1123

7.00 DEEL  
2 1 02/10/8

AGREEMENT dated this 31<sup>st</sup> day of January, 1986, by and between HERITAGE CABLEVISION ASSOCIATES OF DALLAS L.P. (OPERATOR), 6465 Jim Miller Road, Dallas, Texas 75228, or the duly authorized representative of the owner BERT VERDUIN - REALTY DEVELOPMENT CORP (OWNER), SHADOWRIDGE WEST JOINT VENTURE.  
 NAME OF PROJECT: HIDDEN RIDGE  
 ADDRESS: 9702 FERRIS PARK  
 CITY, STATE, ZIP: DALLAS, TX 75243

1. For and in consideration of one dollar (\$1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, OWNER hereby grants the OPERATOR the right to install, own, operate and maintain a community antenna television system (hereinafter referred to as the CATV System) within and for the residents of the apartment or condominium building, or buildings consisting of 228 units, located in the City of Dallas, County of Dallas, State of TEXAS. The street addresses of the aforementioned units appear in Part II of this Agreement. OPERATOR specifically reserves the right to initially install, operate, and maintain its CATV System in a manner necessary to service only those apartments or units for which OPERATOR then has specific requests for service, and thereafter, as subsequent requests are made to OPERATOR for service to additional apartments or units, to then install any equipment necessary to provide such additional service.
2. OWNER shall provide without charge to the OPERATOR adequate space and right-of-access, including rights of ingress and egress, for installation, operation, maintenance, inspection, replacement, direct sales, removal, and disconnection of the CATV System.
3. OPERATOR shall install, own, control, and maintain the CATV System in the buildings at its own expense. Ownership of all parts of the CATV System shall be and remain the personal property of the OPERATOR. Equipment shall be installed in accordance with good engineering practices and shall conform to normal CATV service installations.
4. OPERATOR agrees to maintain public liability insurance of not less than \$1,000,000 for injury to any one person; \$1,000,000 for injury resulting from any one accident; and property damage liability of not less than \$1,000,000.
5. RESIDENTS of the buildings, if they desire connection to the cable system, shall be charged and billed individually for connection to the CATV System the normal monthly rate and start-up charge (installation charge) for the CATV System then in effect by OPERATOR in the area.

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6. OPERATOR shall be responsible for any or all damages directly caused by its workmanship, and/or direct damages caused during installation except for the insertion of screws through the surface of walls for attachment of peripheral equipment or the boring of holes which is part of the normal workmanship and which shall not be construed as damages. OPERATOR agrees to hold the OWNER harmless from damages to television sets as a result of the OPERATOR's workmanship.

7. The Agreement supersedes all previous agreements, if any, between the parties.

8. \*OPERATOR agrees to consult with the OWNER on wiring plans before installation and OWNER/MANAGER agrees to give approval of such plans which shall not be unreasonably withheld or delayed. Installation shall not commence until such approval is received by OPERATOR.

9. This Agreement shall remain in full force and effect and run concurrent with OPERATOR's and its successor's assignees or affiliated company's franchise agreement with the City of Dallas or any subsequent franchise renewal.

10. Owner shall inspect the installation and make a written claim for any alleged damages within ten (10) days of the date of written notice by operator of installation. Failure to submit a claim within such time period shall be construed to mean that no damages occurred in connection with the installation.

11. Following are the individual building addresses pertaining to this Agreement:

9702 FERRIS BRANCH

12. OWNER agrees to deliver site and floor plan to OPERATOR with signed Right of Entry.

\*OWNER hereby grants BERT VERDUIN permission  
NAME  
to approve wiring plans before construction begins.

ON SITE CONTACT:

LINDA BROWN  
NAME

341-5922  
PHONE NUMBER

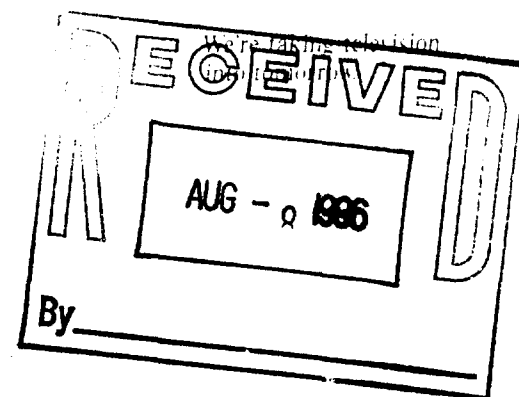
Bert Verduin  
SIGNATURE OF OWNER

SIGNATURE OF OWNER

Vicki Bader  
SIGNATURE OF OPERATOR

88027 3311

# APPENDIX B



August 5, 1996

Mr. Sam Menlo  
Century Quality Management, Inc.  
4221 Wilshire Blvd.  
Suite 210  
Los Angeles, CA 90010

Re: Cable Television Service at El Conquistador Apartments

Dear Mr. Menlo:

We are in receipt of your correspondence dated July 9, 1996 to TCI of East San Fernando Valley, L.P. ("TCI-ESFV") which advises of termination of cable service to the 94-unit El Conquistador apartment complex, located at 15005 Sherman Way in Van Nuys, California.

We are surprised and confused by your letter in view of the valid, executory contract that exists between Menlo Enterprises and TCI-ESFV's predecessor, United Cable Television of Los Angeles, Inc., dated May 20, 1988 (see attached Apartment Or Condominium Complex Cable Television Installation and Service Agreement). By what legal authority do you purport to terminate our agreement?

Additionally, have you made OpTel, Inc. aware of your contractual relationship with TCI-ESFV, and have you provided them with a copy of our valid agreement? Also, we would ask that you clarify for us any arrangements you may have made with OpTel, Inc. for "cutover" of service on August 13 at the property as you reference in your letter.

You should be aware that pursuant to ¶5 of the governing agreement, title to the internal distribution system at your apartment complex is to remain with TCI-ESFV for the duration of the agreement and thereafter for removal or, at its option, abandonment, upon lawful termination of the agreement. We would respectfully point out to you that we cannot and will not tolerate conversion of our property by a property owner or a third party, nor will we allow any interruption of service to our customers.

2233 112th Avenue North  
Bellevue, WA 98004  
206-462-1820  
FAX 206-462-1821

Mr. Sam Menlo  
August 5, 1996  
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In summary, we would ask that you thoughtfully reconsider your position on this matter and withdraw your communication of July 9. If not, TCI-ESFV may be forced to take any and all actions necessary to protect our legal rights under both contract and tort theories.

We look forward to your timely reply.

Cordially,

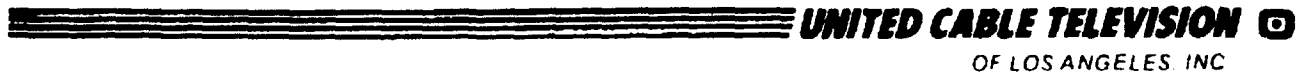


Robert Trafton  
TCI West, Inc. Legal Department

enc.

cc: Terrel Davis, Esq., w/enclosure  
S. Leigh Fulwood, Esq., w/enclosure  
Michael Katzenstein, w/enclosure  
Kurt Taylor, w/o enclosure





## APARTMENT OR CONDOMINIUM COMPLEX CABLE TELEVISION INSTALLATION AND SERVICE AGREEMENT

Entered into this 20 day of May, 1998 by and between Eddie Gordon & Menlo Enterprises ("Owner"), and United Cable Television of Los Angeles, Inc., ("United").

WHEREAS, United is in the business of providing cable television services; and WHEREAS, Owner has title to, or is the duly authorized agent of the person holding title to, or is the association formed by the owners of certain real property or improvements with a street address of 15005 Sherman Way, consisting primarily of 94 residential units, common areas and adjacent property ("Complex") and,

WHEREAS, Owner wishes to provide cable television service for such units, and United is willing to provide such services to the Complex under the following terms and conditions,

THEREFORE, in consideration of the mutual covenants contained herein, the parties agree as follows:

1. **UNITED'S SERVICE.** United agrees to provide cable television services to the Complex for the benefit of the individual tenants therein. Nothing herein contained shall in any way be construed as obligating Owner for the monthly service charge(s); therefore it is expressly understood that payment for the use of said cable or services is the responsibility of the subscribers residing at the Complex.

2. **INSTALLATION.** United agrees to install in the Complex, the electronic equipment ("System") necessary to provide the cable television service to all household units therein, such installation shall commence as soon as reasonably possible upon execution of this Agreement.

Owner agrees to provide, without charge to United, adequate electricity and space for the installation, maintenance, and operation of the System.

Owner agrees that neither it nor any of its agents or employees will tamper with or make unauthorized connection to United's System.

United agrees that all work will be performed in a workmanlike manner, and shall be in accordance with all applicable laws, rules, and regulations of governmental authorities, including building and electrical codes. United shall restore those parts of the Complex which are altered or damaged during the installation or maintenance of the System to the condition of such parts immediately prior to such installation and maintenance.

During the term of this Agreement, United shall maintain the System in a satisfactory working condition, so that the pictures delivered to the individual households shall be at least as good a quality as the signals delivered to other subscribers to the cable television system.

3. **ACCESS TO THE COMPLEX.** Owner grants the right and concomitant easement appurtenant to supply cable television service along with other communications and information services now or hereafter offered by United, to the Complex for the term of this Agreement. Such grant shall include reasonable access (with ingress and egress) to the Complex, all for the installation, maintenance, service or removal of the System in the event of termination.

The access specified above shall include the right to do all things on or in the Complex which are necessary or appropriate to the installation, maintenance or provision of that service, including the right of access for replacement of the Systems, along with the solicitation of sales, marketing, disconnection of service, and subscriber equipment retrieval.

Owner permits United to advertise that residents of the Complex will have cable television service available, by placement of suitable advertising material in the common areas of the Complex, as approved by Owner, which approval shall not be reasonably withheld; and to allow United's salespeople to visit individual households of the Complex from time to time.

United shall not enter any occupied rental unit without the prior consent of the occupant, Owner, or the Complex's manager, shall reasonably assist United in seeking access to individual residential units within the Complex.

4. **PAYMENT FOR SERVICE:** It is understood that the individual residents of the Complex have the option of subscribing to United's services; provided however, that United reserves the right in its sole option to refuse service, or to provide special promotional rates and schedules to certain residents. Each resident so subscribing shall be charged and billed individually by United for connection to the System and for the services provided, at installation charges and monthly rates set by United.

5. **CONTROL OF THE SYSTEM.** Notwithstanding anything contained above, United may terminate this agreement upon sixty (60) days written notice to the Owner if United is unable to install or continue the maintenance of the System due to any governmental law, rule, regulation, judgment of any court, or any other similar reason beyond the control of United.

United at all times shall retain title to and control of the System installed, maintained or used pursuant to the terms of this agreement. It is specifically agreed that the System so described shall not be considered as fixtures to the Complex. At the expiration or termination of this agreement, United shall retain title to and control of the distribution equipment comprising the System, and at its option may either remove same from the Complex, or abandon such equipment in place.

6. **FRANCHISING AUTHORITY.** The parties understand that United is subject to the provision of its franchise with the city or county in which the Complex is located, and to the provisions of applicable federal and state laws and regulations.

7. **EXCLUSIVE RIGHTS.** The rights granted herein by the Owner to United to construct, operate and maintain the System, and to provide the Basic Service and Premium Services are exclusive. Owner shall not, during the term of this Agreement, allow, contract for or provide any other cable television service or pay television service at the Complex, or any portion thereof, without the prior written consent of United. Nothing in this paragraph shall prevent any individual resident at the Complex from subscribing to alternative cable or pay television services in their own residential unit.

8. **TERM.** The term of this Agreement shall commence on the date hereof and continue in effect consistent with the term of the Franchise and renewal of the Franchise as granted by the City/County of Los Angeles.

9. **ENTIRE AGREEMENT.** This Agreement constitutes the entire understanding between the parties, superseding all negotiations, prior discussion, and preliminary agreements made prior to the date hereof. This Agreement may be modified or amended only by a written instrument signed by each of the parties hereto.

UNITED ARTISTS CABLE TEL:818-376-0555 Jul 17'96 15:33 No.013 P.04  
individual households shall be at least as good a quality as the signals delivered to other subscribers to the cable television system.

**3. ACCESS TO THE COMPLEX.** Owner grants the right and concomitant easement appurtenant to supply cable television service along with other communications and information services now or hereafter offered by United, to the Complex for the term of this Agreement. Such grant shall include reasonable access (with ingress and egress) to the Complex, all for the installation, maintenance, service or removal of the System in the event of termination.

The access specified above shall include the right to do all things on or in the Complex which are necessary or appropriate to the installation, maintenance or provision of that service, including the right of access for replacement of the Systems, along with the solicitation of sales, marketing, disconnection of service, and subscriber equipment retrieval.

Owner permits United to advertise that residents of the Complex will have cable television service available, by placement of suitable advertising material in the common areas of the Complex, as approved by Owner, which approval shall not be reasonably withheld; and to allow United's salespeople to visit individual households of the Complex from time to time.

United shall not enter any occupied rental unit without the prior consent of the occupant. Owner, or the Complex's manager, shall reasonably assist United in seeking access to individual residential units within the Complex.

**4. PAYMENT FOR SERVICE:** It is understood that the individual residents of the Complex have the option of subscribing to United's services; provided however, that United reserves the right in its sole option to refuse service, or to provide special promotional rates and schedules to certain residents. Each resident so subscribing shall be charged and billed individually by United for connection to the System and for the services provided, at installation charges and monthly rates set by United.

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**9. ENTIRE AGREEMENT.** This Agreement constitutes the entire understanding between the parties, superseding all negotiations, prior discussion, and preliminary agreements made prior to the date hereof. This Agreement may be modified or amended only by a written instrument signed by each of the parties hereto.

**10. BINDING AGREEMENT.** The terms of this Agreement shall extend to and be binding upon the heirs, successors and assigns of the parties hereto and shall be enforceable at law or equity.

Owner understands that United has made a significant capital investment in installing the System in the Complex, and agrees that, during the term hereof, Owner will cause any purchaser of the Complex to assume, as assignee of this agreement, all of the obligations of the Owner hereunder; United will likewise cause any purchaser of United's cable television system to assume all the obligations of United hereunder. ~~This consent may not be otherwise be assigned except by written consent of the other party hereto, which consent shall not be unreasonably withheld.~~ The premises, covenants, benefits and burdens hereunder shall run with the property constituting the Complex which is the subject of this agreement.

**11. NOTICES.** All notices to be given to either party to this Agreement to the other party shall be in writing.

If to United: same as below

If to Owner: same as below

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first written above.

UNITED CABLE TELEVISION OF  
LOS ANGELES, INC.

Menlo Enterprises

Eddie Eardon

Supervisor

1501 So Fairfax

Los Angeles, Ca

90036

213-931-1050

By: [Signature]

Title: President

Address: 15055 Oxnard Street

Van Nuys, CA 91411

Phone: (818) 785-9090

**12.** United agrees that no installation shall commence without written approval of design plan by owner.